"AN EXAMINATION OF THE MAGISTRATES JURISDICTION (AMENDMENT) ACT".

A dessertation submitted in partial fulfilment of the requirements for the LLB degree.

University of Nairobi

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By

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JULY 1982.

ACKNOWLEDGEMENTS:

In writing this dissertation I am indeed indebted to many people whom I cannot be able to mention by name who helped me in various ways. But I must mention the following without whose help this work would not have been complete; Mr. Gilbert Mainye (Advocate) for his initial encouragement; My brother Mr. Onchiri Masese (Advocate) who helped me financially. Thus enabling me to carry out my research and the typing expenses.

My supervisor Dr. H.W.O. Okoth - Ogendo - Dean faculty of law whose apt comments made the dissertation take the shape it did.

Last but not least Mrs Rachel Mutuku for having typed the dissertation.

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TABLE OF ABBREVIATIONS:

1. E. A.: East African law Reports.
2. K.H.D: Kenya High Court Digest.
3. KLR : Kenya Law Reports.
4. O.U.P: Oxford University Press.
5. NBI. : Nairobi.

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INTRODUCTION AND METHODOLOGY:

In any state, land is an essential asset economically, socially and politically. It is therefore not suprising that land has remained a very sensitive issue in all societies.

This thesis is aimed at assesing the possible extent to which the magistrate's jurisdiction (Amendment) Act of December 1981, will solve an injustice occassioned by the Registered Land Act which is one of the two basic statute in Kenya's Land Law.

In the 1950's a process started whereby individuals were to be given titles on pieces of land. This was done by the process of adjudication, which is a process of ascertaining an individuals interest in land, consolidation, a process of putting together the various pieces of land that one owns, and registration of the consolidated piece of land on a register which shows all the interests that one has on a piece of land.

The Registered Land Act[I] is an Act of parliament passed in 1963 to deal with the process of Land Registration. The Act was passed with an aim of providing "a complete code of property law, which will provide first, machinery for registration, and secondly all that is considered neccesary for the practical needs of land owners in regard to the security and proof of, and the creation and transfer of interests in land, whatever these interests may be.[2]" Interests in land would ofcourse include, charges, leases and cautions.

The Registered land Act as enacted however brought about a system of land holding which was essentially alien to the indegenous population. The provisions of the Act and its impact was to the effect that individuals were declared absolute proprietors of land and the titles conferred on them were indefeasible. This process resulted in a situation whereby one person [illegible] proposed to be registered on behalf of the clan or a family

was given an absolute indefeasible title which defeated all the other rights in land which did not appear on the register. This led to a situation whereby people who were customarily entitled to land lost their interests. The courts in solving any land dispute either civil or criminal applied the provisions of the Registered Land Act. This brought about the absurd results in the eye of those people who lost rights which they were otherwise customarily entitled to.

This situation came about because the effect of registration was to extinguish customary rights in Land. This was the effect of section 27 and 28 of the Act.

S. 27 provides;

(a) "The registration of a person as the absolute proprietor of land, shall vests in that person, the absolute ownership of that land, together with all rights and privileges belonging to or appurtenant thereto".

while S. 28 provides as follows:-

"The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall be rights not liable to be defeated except as provided in this Act".

These two sections clearly show that once a person has been registered as a proprietor his title cannot be defeated except the rights he holds as a trustee or subject to overriding interests.

When the exercise of Adjudication and registration was started in the 1950's some communities either due to illiteracy or the fact that they were away from home for one reason or the other or because they were too many in a small region, proposed one person or a number of people to be registered as the proprietors of land, on the understanding that those registered were to hold the land on trust for the rest of the people who were not registered. A family could have one of its members registered as the proprietor of a piece of land which the rest of the family was entitled to due to the fact that it was family land.

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At the time when the exercise of registration started, Many People especially in the Central Province had run away from their homes and were living in the forests as freedom fighters or some had been detained owing to the political climate prevailing at that time. People then were registered as proprietors of land to the exclusion of all these people who then lost the land they were entitled to.

Those who had customary rights could be declared trespassers on land of the registered proprietor, the customary rights notwithstanding the trust which the registered proprietors were to hold the land on, was not shown on the register, following the provisions of the Registered Land Act and so could not be enforced.

Many People lost land which they were otherwise entitled to in this way. It is these people who felt that the courts which declared them trespassers on land which they had rights to were not doing justice and the lawyers who were using the provisions of the Registered Land Act to defeat their rights were robbing them of their land. It was then realised that the provisions of the Registered Land Act were not reflecting justice as understood by the majority of the people in Kenya. The courts tried to solve the injustice by using the concept of a constructive Trust. This trust however did not solve the problem adequately since its application is only discretionary.

The legislature in its wisdom in a bid to solve the injustice passed the Magistrate's jurisdiction (Amendment) Act. This is an Act which amends the Magistrates courts Act.[3] The Act confered jurisdiction of land disputes in Magistrates courts. The Amendment Act has the effect of removing jurisdiction in some of the land disputes from the Magistrates courts and bestowing it on a panel of Elders. This panel of elders it was hoped could do justice by applying customary law which is understood by a majority of the people and not provisions of the Registered Land Act.

In this paper I shall attempt to show the possible extent to which this Act may solve the problem envisaged above.

METHODOLOGY:

In analysing the Magistrates jurisdiction (Amendment) Act. It is imperative that I put it in its historical perspective so that one can appreciate how the problem the Act was aimed at solving arose. In view of the above fact various text-books, articles and journals will be of great help, since it is only through them that the historical development of Kenyas land law can be traced. I shall trace the History from 1895 when colonial rule started in Kenya this is for obvious reasons, because material on Kenya's political, social and economic status are scanty. Also by 1895 we can see the original position of land Tenure in Kenya and it is from this time that new developments came in land holding and this is the embryo of the problem that finally neccessitated the Act under consideration.

I will manifest parliaments intentions of passing the Act by reference to parliamentary debates. These debates will be incorporated in the dessertation especially when it gets to the analysis of whether the problem has been solved as intended.

The research undertaken in this paper does not claim to be exhaustire due to the various difficulties encountered, like the reluctance of some personnel to comment objectively on it or just declining to comment on it, because it was passed against the background of a presidential directive that certain land matters should be handled by elders, since the lawyers were not doing justice in the public eye. Secondly, the scope allowed for the dissertation and especially the time which is allowed for it does not permit an exhaustive research to be made.

Various views however gathered shall be of great help in assesing the possible impact of the Act in the development of Kenya's land law. The Act being a very recent one it is quite difficult to say with confidence what its impact on Kenya's Land Law is. What then appears in this paper are the views of various people interviewed, these views will also include those gathered from Newspaper items, my own views, those of my supervisor, lecturers in the faculty of law and those of my collegues.

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The bulk of the dissertation is however based on the Act itself, the way it will work in relation with other Acts in force in Kenya, and its general appropriateness. In conclusion I shall suggest some alternative ways in which the problem could have been solved. I shall do this by mainly suggesting Amendments to some sections of the Registered Land Act.

CHAPTER ONE:

ORIGINS OF THE PROBLEM THAT THE AMENDMENT ACT WAS DESIGNED TO SOLVE:

1.1 HISTORICAL ORIGIN OF THE PROBLEM:

Kenya as an entity was born in 1886, when E. Africa was partitioned into English and German spheres of influence following the Berlin conference of 1885.

From 1895 - 1963 Kenya was under the British colonial rule legally or otherwise. Before the Europeans intrusion into Kenya, there was in existence the "African Customary Tenure". This phrase refers to the African ideals concerning the holding of land. The African perception of the relationship between man and land was such that land was not a commodity that could be owned, sold and bought by individuals. It was seen as a free gift from God,[1] to all living things. This free gift belonged to all members of the community and no individual could alienate it to himself. The allocation of land to the members of the community and settlement of disputes regarding who was supposed to be using what particular piece of land was done by elders who were versed in the customary land Tenure.[2] As at this time then, all was well and in case of disputes the elders stepped in and solved the problems that arose, using the African customary law, which the majority of the people were familiar with and as such there arose no problem since people felt that justice was being done in light of the law that they were conversant with.

To enjoy rights in land however, one had to be a member of a particular community. Land belonged to a community in varying degrees ranging from the Tribe, the clan, and finally the family. The family was the least unit of ownership that could be traced in African customary Tenure.
There were ways however in which people who did not belong to a community could enjoy rights in land, examples of these being the "Ahol" among the Kikuyu, the "Jadok" among the

Luo and the "Abamenya" among the Luhyia communtiy.

"With the intrusion of the European settlers into Kenya, A new and essentially alien perspective in state - land relationship began to emerge. It was now being said that the state as an entity owned land and the users merely had a bundle of rights in the land"[3] A process slowly began of undoing customary tenure and replacing it with English Tenure. What finally emerged was the free enterprise economy which is rooted in individualism, land was treated by the English as a commodity that would be owned and sold. The English concept of land was that all land belonged to the state, and individuals had a bundle of rights in it with the fee simple as the most amble of these rights. The rights that an individual had were put in the register which was made in such a way that it reflected what actually was on the land itself.

With the settlers came a large body of English law. The law that they brought provided machinery for exercise of ownership known to the common law jurisprudence[4].

In 1895 Kenya was declared a British protectorate, The crown at this time had only those rights to land that it had acquired under the 1895 treaty that gave it right to declare a protectorate over Kenya. An examination of the 1895 treaty reveals that there had been no indication of an agreement to deal with land in any way.

In 1897 the East Africa order in council gave the commissioner powers to make regulations for peace order and good government.[5] He made the 1897 land regulations, under which he could issue certificates of occupancy for a period of 99 years. These regulations however were deemed inadequate by the settlers who were interested in getting rights in land equivalent to those that they were used to back home. This requirement was difficult to achieve because Kenya was a protectorate and as early as 1833 the Foreign jurisdiction Act which gave the crown power to exercise jurisdiction in a foreign country had carried a warning that the crown did not have powers to dispose of that foreign land.

They only had political jurisdiction.[6]

In the late 1890s the English jurists came up with a theory that in countries like Africa where people were primitive and had no central government, there in law was no difference between a protectorate and a colony[7]. A colony was seen as an arm of the British colony.

Using the legal theory above, the crown could now be able to appropriate "unoccupied" land which they would give to the settlers in terms of the English Tenure.

The 1901 East Africa lands order in council was passed to give effect to the theory. It vested land within the colony in the crown. The commissioner could now deal more freely with the land. Crown land was defined as public lands wihtin the East African protectorate, which by the time were in control of her majesty.

The crown lands ordinance 1902 was however vague in its definition of what crown land was .

The 1915j crown lands ordinance was more elaborate in its definition of what crown land was. In this ordinance crown land was defined as "all the land occupied or unoccupied by Africans"[8]. The effect of this ordinance was to make Africans tenants at will on the crown land[9].

The now acquired crown land was given to settlers in various ways. The commissioner could now give leases of up to 999 years, and sell freeholds of less than 1,000 acres. These leases were converted to freeholds at independence.

In 1919 there was passed the registration of titles Act, which registered rights that the settlers had in land.

The introduction of holding land individually led to a disturbance in the equillibrium between patterns of land use and availability of land[10], with the results of mapy problems and

deterioration in land use. These problems came to a head in the 1950s when there was great deterioration in fertile land, landlessness became rampant because people accomodated under African customary Tenure could no longer be accomodated under the English Tenure that had been introduced. There was erosion, overstocking and diseases. Land was held in fragments by Africans. All the above were blamed on African customary Tenure. It was argued that it was African customary Tenure that led to all these problems. So the remedy to them was to overhaul the African land Tenure system and replace it with an alternative system based on consolidation and individual holding.

Plans were made aimed at intensifying the development of African agriculture. One such plan was the swynertton plan of 1954, which said inter-aliathat, "sound agricultural development is dependent upon a system of land tenure, which will make available to the African farmer a unit of land .... He must be provided with such security of tenure, through an indefeasible title ..... as will enable him to offer it as security against financial credit".

The process of replacing customary land tenure with English land tenure went on without any legal sanction between 1954-1956. When the native land tenure rules were passed. These rules based on the swynerton plan were made to provide for adjudication of peoples interests in land, consolidation of scattered pieces of land and the registration of the new interests in land.

Adjudication in land was done by elders versed in customary tenure [12].

At this time, the Africans had started having rationalised thinking and redefined valuation and assesment of the effect of deprivation of their land. This resulted in the Mau Mau uprising. The administration now also saw registration as an asset for it could be used to reward the loyalty of those Kikuyu who allied themselves with the administration against Mau Mau [13].

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The process of adjudication gave rise to problems because some people were being deprived of their rights in land. Many disputes arose, but they were not solved because in 1957 the African courts (suspension of land suits) ordinance was passed which suspended all land disputes. Registration went on without land disputes being solved until 1963 when the Registered land Act was passed. S. 159 of which vested jurisdiction of land disputes in the HIgh court and the Resident Magistrate's court.

In 1959, the land Registration (special areas) ordinance was passed which catered for adjudication consolidation and Registration. It adopted the 1956 native land tenure rules. A state register was established where all rights of a proprietor of land appeared. Every landowner named in the adjudication register was entitled to be registered as the freehold owner of the land. A right of occupation under native law and custom if shown on the register was deemed vide S. 33(6) to have been converted into a year to year tenancy, otherwise it was extinguished. First registration was declared unimpeachable even if fraudulently obtained[14] with regard to registration the court could not rectify a first registration[15].

In 1963 the part of the land Registration (special areas) ordinance, dealing with registration was enacted into the Registered Land Act. All rights in land were now to be governned by the Act. This was as soon as land had been adjudicated upon. The Act was a reproduction of most of the sections of the Land Registration (special areas) ordinance. The Act conferred an indefeasible title on the proprietor of a piece of land.[16] Section 143(1) like its predecessor in the Land Registration (special areas) ordinance S. 89 provides that the courts cannot rectify the register in the case of first registration even if fraud or mistake is proved.

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1;2 THE SOCIO-ECONOMIC AND POLITICAL BASIS OF THE PROBLEM.

The process of adjudication, consolidation and registration started in the 1950 was continued into independent Kenya. In essence therefore the process of replacing customary land, law with English land law continued into post independence Kenya. This led to a growing discontent among the Kenyans of African origin since the system and laws which they recognised and understood were not being applied.

The problems that flowed from the replacement of customary law by English land law, were not only legal, but also social. Since now land was held in a different way from the way it customarily was, the equillibrium between land available and the population was disturbed. Granting of individual proprietorship meant that people who were customarily accomodated could no longer be so accomodated. What this resulted in was landlessness. The registered proprietors could use the courts to declare all the other people trespassers on his land who could be evicted, these people became landless then, Also in the 1930's the colonial administration had put the Africans into various reserves. It was then realised at the time of adjudication that not all could be given titles to land, since this could be economically unenviable. The squatters who were in big european farms, had no title to land and were ofcourse rendered landless in the English sense.

This social problem can be better understood when one also understands the kind of economy that the colonial rule imposed in Kenya.

Land had become a commodity which one could own, sell or mortgage, unlike the African concept of it. The English ofcourse were introducing capitalism which prevailed back home. The people who were conferred with titles realised that they could use the land in whatever way they wanted. These proprietors could then mortgage the land or sell it outright in the case of which those customarily entitled could easily lose their rights.

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Landlessness was there even before the colonial administration but the landless were customarily contained like we saw above the "Ahoi" among Kikuyu, but this new system did not create a way of accomodating them. Those who were declared landless ofcourse raised the cry about losing their land. From the political point of view, the problem of landlessness came about because the colonial administration recognised the process of consolidation and registration as an asset which could be used to reward the loyalty of the Kikuyu who allied themselves with the administration against the mau mau insurgents. It was used as a campaign to create a stable middleclass of politically conservative Kikuyu who would become a counterforce against future re-emergence of militant nationalism, for they would have so much to lose in case of a resurgence, that they will consider their position before engaging in any violence. Those who were registered owned the land and could defeat titles of those who were not registered.

By independence time in 1963 it was clear that landlessness was a clear problem, and something needed to be done about it. The situation it is submitted did not change in post colonial Kenya. The question is why?

As the colonialists realised that independence was imminet they embarked on an exercise of accomodating and co-opting the Africans into their system especially the economic system, victims of this co-optation were the African elite who could perpetuate and continue the colonial economic and political trends. The colonialists needed to do this because they well knew that a radical break from their system could mean alot of economic loss to them. The 2nd world war had taught them that the Africans could supplement them in production of food crops, and also of more importance could produce raw materials for the British industries, so they allowed them to grow cash crops like coffee, tea and pyrethrum. To enable them do these they gave them indefeasible titles which could help them get loans for development.

The elite are the ones who could be trusted to carry on this exercise. The constitution which was finally drawn by the elite

group for Kenya contained stringent provisions for sanctity of property, so that property was well protected, it also gave security of tenure to the judges , who were basically white and these judges kept on applying the English law in relation to rights to land. The elite were permitted to get land in the former "white Highlands" so that they did not have much to complain about. In this way continuity of the colonial ideology was insured. The landless people complained ofcourse but nothing could be done to them, since they had no rights in the land which they cliamed to be theirs. This is shown by the attitutde the courts had as illustrated by the following High court decisions, the first decision is SELA OBIERO VS. ORIGO OPIYO [17].
The plaintiff - Sela Obiero was the widow of one Opiyo who died in 1938. The defendantsOrigo Opiyo, Masime Opiyo, charles Wesonga and Nyasembe Opiyo, were sons of the plaintiffs co-wives. The plaintiff was the registered proprietor of an area of land. The defendants admitted in evidence that they had been on and cultivated the land since time immemorial, as such they claimed under customary law to be the owners. There was also an argument that the plaintiff had got herself registered as the proprietor by concealment or false representation of material facts. It was held that, even if fraud had been proved, the plaintiffs title was indefeasible as it was a first registration, and also that section 28 of the Registered Land Act conferred upon a registered proprietor a title "free from all other interests and claims whatsoever" subject to those shown in the register or overriding interests. And that customary rights are not overriding interests and they cease to exist when the land is registered and proprietorship conferred upon the holder.

As a result of this an injunction was given to restrain the defendants, their wives, servants or agents from trespassing on the land issued.

In the second case of ESIROYO VS. ESIROYO [18] it was held that the effect of registration was to extinguish customary land rights of those who are not registered as proprietors "if the legislature wanted the African customary law to be recognised nothing could have been easier than to say so".[19]

This position was not acceptable to the Africans who lost the land in which they had rights. As time went on and the complaints increased ofcourse. The courts also realised this injustice, and tried to imply a trust in certain decisions. These are MUNGORA WAMATHAI - V - MUROTI MOGWERU [20] and MUGUTHU - V - MUGUTHU [21] In the latter case it was held that the elder of the two brothers, who was registered as the proprietor of a piece of land under the Registered Land Act, held it upon trust for himself and his younger brother, irrespective of what the register said.

The trust used in the above case is the English concept of a constructive trust. But there are formalities of creating trusts in the English jurisprudence, it is only the constructive trust which has no formalities, but is just imposed by the courts in its good conscience and justice. So one cannot be sure that he is going to get it or not since it is discretionary.

It has been suggested that an African customary trust should be evolved, which can solve the problem above. It has been argued in a recent case that expert evidence is needed to prove a customary trust. This should be done in compliance with the evidence Act which provides:-

> S. 51(1) "when the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of the existence if it existed are admissible."

This argument arose in the case of ALAN KIAMA - V - NDIA MATHUNYA AND OTHERS [23] where Madan J. disagreed with Muli J./s decision, by holding that no expert evidence had established that Kikuyu customary law contained the concept of a trust.
The case went ahead to uphold the decision in Esiroyo -V- Esiroyo that customary rights were extinguished by S. 28 of the Registered Land Act at registration. - gave relief but based it on S. 30(g) - rights of a p[erson] in possession or actual occupation . . .

The injustice then still remains. The legislative has tried to solve this problem so that justice could be seen to be done. Most people blame the courts and the lawyers as being the culprits of this exercise of swindling people of their land because the court system as it exists now is a new concept to the

African community and as has been indicated above, the law applied by lawyers is essentially alien and does not reflect justice as the Africans understood.

The Magistrates jurisdiction (Amendment) Act by Amending the Magistrate courts Act bestows jurisdiction in certain land matters in a panel of elders. What the legislature aimed at is that the elders could apply customary law which most Africans understand. In so doing a way might be found of accomodating the people who were customarily entitled other than leaving them landless. It must have been done against the background that people who were landless were somehow accomodated in the African Land Tenure, but the new law did not provide a way of accomodating those who are not registered as proprietors.

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CHAPTER TWO:

THE MAGISTRATES JURISDICTION (AMENDMENT) ACT.

The Magistrates jurisdiction (Amendment) Act, amends the Magistrates courts Act by inserting after section nine, the following new part:-

PART III^A: **JURISDICTION IN CERTAIN CASES RELATING TO LAND:**

S. 9^A (1) "Not withstanding the provisions of sections 5-9 or any other written law conferring jurisdiction, but subject to the provisions of this part, no Magistrates court shall have or exercise jurisdiction and powers in case of a civil nature involving:-

(a) The beneficial ownership of land.

(b) The division of or the determination of boundaries to land, including land held in common.

(c) A claim to occupy or work land.

(d) Trespass to land.

(2) An issue relating to any matter set out in paragraphs (a) to (d) of subsection (1) shall be reffered to a panel of elders to be resolved.

The act also repeals section 159 of the Registered Land Act and replaces it by the following provision.

S. 159 "Civil suits and proceedings relating to title to, or the possession of land, or to the title to a lease, or charge, registered under this Act, or which is expressed by this Act not to require registration, shall be tried by the High court and where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident Magistrates court or where the dispute comes within the provisions of part III^A of the Magistrate's courts Act in accordance with that part."

The Act therefore deals with disputes that are defined in part three A of the Magistrate's courts Act. The disputes covered however must all be of a civil nature. The Act does not give jurisdiction for criminal disputes in land.

The beneficial ownership of land will include charges, mortgages, profits, easements and cautions that one might have on any land.

The division of land into smaller portions including land held in common shall all be reffered to the panel of elders. This means that other divisions of land or determination of boundaries which are of a criminal nature are not covered.

The trespass to land in subsection D is civil trespass as apposed to criminal trespass. It is therefore only offences of a civil nature that are covered by the Act.

The land the Act deals with is agricultural land as defined in section two of the Land Control Act, whether or not that land is registered under the Registered Land Act. In the Land Control Act[2] agricultural land means land not within a municipality or township or a market, or land within the Nairobi area or the municipality of Mombasa that is declared by the Minister as agricultural land for the purposes of the Act.

The land control Act defines agricultural land in the sense of land holding. It deals with subdividing or partitioning or disposing of nay land held by a proprietor, Unlike the agriculture Act which deals with the economic use of land.

Land in the Magistrates jurisdiction (Amendment) Act deals with land as defined in the Land Control Act, since it also deals with transactions similar to those covered by the Land Control Act they include sales, transfer, leases, mortgages exchanges and partition of land.[3]

This is not similar to the Agriculture Act[4] which deals with promotion and maintenance of stable agriculture.

Elders have no jurisdiction therefore in relation to land situated either in municipalities, towns or markets. Because they are not within the defination of land within the Land Control Act.

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2:1 WHY PICK ON ELDERS AND WHAT LAW ARE THEY SUPPOSED TO APPLY?

The Amendment Act does not specify what law the elders will apply in solving the disputes envisaged above. It is therefore only from what can be gathered from the intentions of the legislative in passing the Act that one can find out what law the elders are supposed to apply. The answer is also forthcoming when one examines the reasons behind the legislatures choice of the elders as the arbitrators in this land disputes.

The choice of elders as the suitable people to solve the civil land disputes came about because from time immemorial, the settlement of disputes was principally done by arbitration and negotiation within the local community in the African society. The process of arrangement of a settlement was conducted by elders[5]. In the past, land issues were taken to and handled by the clan or community elders and not the law courts[6].

This shows the position the way it was among the African communities. To illustrate this further, we can have a look at some of the African communities and see how the situation was.

> "There were no court institutions among the Kikuyu, ... they solved their matters at home, where the father was the moderator, while clan matters were solved by a council of elders. "Mbari" (clan) affairs were co-ordinated by a "Mbari" council composed of all the initiated males who had attained elder status."[7]

Among the Luo vocommunity we find the same situation.

> "Among the Luo, a clan is called " oot". Elders made up clan councils and met frequently to discuss clan affairs and to settle inter-clan disputes regarding cattle and Land."[8]

The Kamba community had the same kind of process. The elders had to agree to any transaction in land and had to be called to make the boundaries to various land demarcations.

"All Kamba elders now agree that it is possible for sons to divide up their inherited land............... provided that

the clan elders agree to it. Normally these clan elders are called upon to make boundaries ....[9]. The elders in the Amendment Act are given jurisdiction over demarcation and subdivisions.

In the Gusii community a clan is known as "egesaku" Egesaku" was the central unit of Gusii social organisation. In settlement of disputes an elder known as "etureti" mediated. A clan could have more than one elder known as "chitureti". These elders met to mediate and arbitrate in all disputes that arose including land disputes. The "tureti" elders knew Gusii customary law and were respected due to their age and wisdom.

It can be safely concluded from the above illustrations that disputes among the African communities including land disputes were arbitrated by elders who were conversant with customary law.

The result of the imposition of the British colonial rule in Kenya was to produce a new institution to complete with the traditional institution of elders. This new institution was the court which applied law based on English jurisprudence. The existing institution was as far as possible retained. The native institutions composed of elders were retained so that the equillibrium could not be suddenly disturbed. A society's laws gives effect to the philosophy of life of that society and people are at peace to see that their philosophy is being given effect. That is why the traditional institutions were retained to give effect to the philosophy of life of the natives. Customary law reflected their philosophy of life so had to be retained. Slowly but surely customary law was eroded especially by the repugnancy clause.[10] No serious attempt was made to codify customary law, and the europeans embarked on "civilising" mission which basically trained African natives to live like Europeans and learn their jurisprudence. The English jurisprudence imported with it a distinction between civil and criminal wrongs. The Africans did not have this distinction. This distinction was introduced by the 1897 East African order in council[11].

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At the time of enacting the Registered Land Act, customary land law was held to be extinguished as soon as land had been adjudicated and registered. It means that the African customary law was replaced by the "superior" English land law at registration. All land was supposed to be registered and it had to be done when a minister directed that a particular area be adjudicated.

The African institution of adjudication was abolished in 1967 after having undergone several renovations which had the effect of Anglicising it more and more. The African courts were abolished and the intergration of courts took place. The structure that came into existence is the one in force today. Parliament established a HIgh court and subordinate magistrates courts. All courts were to be used by all people irrespective of race. The people appointed to man these courts were either europeans themselves or those Africans trained in the western way and neccesarily western jurisprudence. So they applied provisions of the Registered Land Act with regards to land which had been registered and adjudicated. The courts presented some unfamiliar features, and to some people the whole idea was totally and incomprehensively alien.[12]

It is from the above that a hue and cry arose from the people who now found their land being governed by a system of law alien to them. Those who mainly complained are the ones who were accommodated under customary law, but could no longer accommodated under provisions of the Registered Land Act. All the complaints were directed at the courts (which were foreign institution) and lawyers (who were trained to apply foreign law which did not reflect the philosophy of the Africans). The magistrates jurisdiction (Amendment) Act was passed with this complaint in mind. The legislature bestowed jurisdiction on the elders. It gave them jurisdiction in civil disputes only. This therefore means that the legislature intended the elders to apply the law that they used to before the enactment of the Registered Land Act. The legislature is going behind the provisions of the Registered Land Act and restoning the position to where it was before the replacement of customary law by English law as embodied in the Act. The legislature had to

restrict jurisdiction to civil disputes only because they are the ones known in customary law.

Therefore the law that the elders are going to apply to customary law and the legislature picked on elders deliberately because they are the ones conversant with customary law and they are the ones who traditionally solved disputes in the communities of the people who complained about the injustice of the Registered Land Act i.e. the Africans.

2:2 COMPOSITION OF THE PANEL OF ELDERS.

The panel of elders shall consist of a Chairman, who is to be either a District officer, or any other person that the District commissioner shall appoint. The person appointed shall be a person who has no previous connection with the issues in dispute, and two or four elders agreed upon by the parties.

The chairman will cause a written record containing the names of the members who took part, the land concerning which the issue was raised, the various issues raised and the decision arrived at. This record shall be signed by each member of the panel, after which it shall be filed in the Resident Magistrate's Court.

The court has power to modify or correct a filed record in some aspects. It can remit a record to the panel of elders upon such terms as it thinks fit. It can set aside the record on various grounds which include corruption. Finally the court shall on request enter judgement according to the decision of the elders if no application is made within thirty days of receipt by the applicant of notice of the filing of the record. Upon judgement being entered a decree shall follow and no appeal shall lie from that decree except in so far as the decree is in excess, of not in accordance with the decision of the panel of elders.

From the foregoing it is clear that the decision of the panel of elders is not final. The court still maintains a supervisory role over the elders decision. The parties are given thirty days within which to appeal if they are not satisfied with the decision arrived at. After this the court gives

a decree which can only be challenged on excess of the decision or for not being in accordance with the panels decision or else the decree is final and conclusive.

To summarise the Act as presently drafted, it is self-contradicting, self-defeating and unworkable. It is self defeating in its aims, this is so because, the Act is aimed at re-introducing customary law in solving certain land disputes, so that the alien law as embodied in the Registered Land Act could be circumverted, since it is unwanted and unacceptable to the majority of Kenyans. The Amendment Act however leaves intact the machinery that abolishes customary law. The Registered Land Act is left intact and so has its full effect of abolishing customary law. It will be difficult to apply customary law to land which has been removed from the realm of customary law by an earlier Act of parliament. Yet in the judicature Act where the source of law are listed, customary law is subordinate to written law.

It is bound to be unworkable in so far as it contradicts other earlier Acts of parliament. Besides it is not very exhaustive. For instance it does not define the customary law to be applied, since customary law has never been codified and the cultural contact has eroded most of the customary law it is not going to be easy to find people well conversant with customary law.

At independence the government directed its attention to completion of the process of intergration and unification of courts for the sake of nationalism. This resulted in the 1967 judicature Act and the Magistrate's courts Act.

The Magistrates courts Act defines a claim under customary law in relation to land to be "Land held under customary Tenure".[13] Customary law was meant to apply to land held under customary tenure i.e. land which hasn't been removed from the realm of customary law by the process of Adjudiction, consolidation and Registration. The effect of the Magistrates jurisdiction (Amendment) Act is to apply customary law to all civil land disputes

covered by the Act whether the land is held under customary tenure or not. It in effect contradicts the Magistrates courts Act.

The transactions that the Act deals with are those that the land control Board has to give consent to[14]. This looks like a contradiction to the Land Control Act.

The Act therefore as presently drafted, although it has good intentions, might prove unworkable in so far as it contradicts other parliamentary statutes and might lead to more confusion in the already confused realm of Land Law.

CHAPTER THREE

THE POSSIBLE IMPACT OF THE ACT ON KENYA'S LAND LAW:

The Magistrates jurisdiction (Amendment) Act was passed in December 1981. As such it will be difficult to asses its impact on Kenya's Land Law. In this chapter I shall try to identify the possible impact that it might have when posited in the prevailing socio-economic and political circumstances prevailing in the country. In chapter two I indicated that the Act contravenes some Acts of parliament. In this chapter I will analyse more illustratively how these contradiction will lessen the impact of the Amendment Act and finally asses how desirable the Act is.

The Act brings about several problems which need to be solved before it can work effectively.

3:1 THE PROBLEM OF ELDERS

In the Act "elders" mean persons in the community or communities to which the parties by whom the dispute is raised belong, who are recognised by custom in that community as being, by virtue of age, experience or otherwise, competent to resolve issues between the parties. Where there are no elders, or where the parties cannot agree upon the choice of elders, then the expression shall mean such persons as the District commissioner shall appoint.

Due to cultural contact between the indegenous communities and foreign communities especially the Eupopean community; Many traditional institution have been interfered with. One of the institutions interfered with is the one through which the traditional "elders" who used to solve disputes were hatched. In the present Kenya's social relations it is difficult to have the calibre of elders that the Act envisaged.

Among the Kikuyu, for one to become an elder, he had to be initiated, after which one gets into the warrior age group. The elders then terminated his warrior services and admitted him to a group of junior elders called "Kiama". The next stage of elderhood was when his son was circumcised. He then paid fees at two stages, "Kiamatimo" and "Athuri" respectively. Then each individual depending on circumstances paid a fee of two goats and then got into the "Kiama" proper. Thus becoming a senior elder. As a sign of elderhood, they wore earrings and carried blackened stuff. It was the highest authority in land vested with executive and judicial powers.[1]

Among the Gusii community the elders were called "Chitureti". For one to be recognised and admitted into the class of "Chitureti" one had to have many wives and therefore many children. He had to be recognised in the community as a man with good leadership in his home and therefore had to maintain a high standard of discipline in his own family. The "tureti" elders must have attained an age where people respected them for being close to the ancestors and therefore what they said had to be complied with since offending them could be tantamount to offending the ancestors. They knew customary law well and therefore did justice using customary law.[2]

With the prevailing social circumstances it is difficult to have these traditional institutions. Conditions are no longer favourable for people to marry many wives due to scarcity of land; people go to school institutions which teach them to lead the western kind of life. You find that people look at the elite as natural leaders while the elders as earlier known are just landed illiterate old men. As such they do not commend as much respect as they used to. Due to the administrative hierarchy you find that it is chiefs and assistant-chiefs or other administrators who stand out as elders in case of anything. Also due to the political circumstances, it is the members of parliament who more often than not are from the elitist class that are accorded eldership, or also due to the economic climate it is the rich people that stand out as elders. These people do not know alot of customary law.

Since customary law has never been codified and our institutions of learning hardly ever refer to it. Right from a kindergarten to university one only learns about western civilisation and associated matters, which means that customary law which the Act intends to revive has been more or less done away with and the present kind of "elders" in our communities are at a disadvantage of applying customary law.

Even if it were possible to find undisputed elders, in some communities, it is quite possible that they will not have the expertise that they ought to. Human mind fades with time. Throughout the colonial rule and even the post independence period customary law had been pushed into the background meaning it is only very few people who might still be conversant with it. Also since it has never been codified there is no source through which one can refresh his memory.

In some communities especially the settler community, it will be quite difficult to pick out who the elders are. The settlers especially the European settlers do not have elders who know their customary law. The Act is meant to apply to all people of Kenya irrespective of race, otherwise it will be unconstitutional.[3] Customary law of the Europeans it is submitted is statute law, which means they will have to apply provisions of the Registered Land Act. However there are Africans who live among the settlers. These are especially the squatters. The problem will arise when a dispute arises between an African and a European. This problem is associated with the problem of borderline cases, if a dispute arises between a member of one community and a member of the other community (tribe), who shall be the elders in this case and which customary law shall they apply? This kind of situation is bound to occur in areas which border each other and inhabited by different tribes.

There are areas which are inhabited by members of various communities who obviously have different customary laws; These are areas like Kapkangani in Nandi District. In such areas it will be difficult deciding what customary law is to be applied in case of a dispute between a member of one community and another member of a different community.

Another associated problem comes up in cases of land that has been bought. It is not uncommon to find a member of the Kisii community living among the Kikuyu community in the central province. In case of dispute between these two whose customary law will be applied and who shall be the elders is it the Kikuyu elders?

Under the Act, the parties to a dispute have got to agree as to the choice of elders. This is so under Section g.B. (b) "Either two or four elders agreed upon by the parties".

The problem that arises here is that ~~parties~~ elders are of an even number. A situation might arise where one party agrees on two elders whom he feels will favour him and the other party the same, so that there will be a deadlock in decisions.

If the parties do not agree on the choice of elders, then a district commissioner shall appoint them. The district commisio-ner in our country usually do not come from their local homes where they can know who are recognised by custom as elders. This might lead to a situation where they will pick people who are known either due to wealth or otherwise. There is also the danger that a District Commissioner can impose some people on the parties, and if such a situation arises, the parties will obviously feel that justice has not been done especially if the people chosen are unpopular among the parties. This kind of panel also chosen by the District Commisioner may have the same features as a court, where parties take no part in choosing the <u>arbitrator</u>. The intention of having the parties choose their own <u>arbitrators</u> was good, but the Act does not exactly satisfy this intention.

The chairman of the panel of elders shall be a District officer of the district in which the land is situated or partly situated, or any other person appointed by the District Commiss-ioner.[4] The powers of the chairman other than those of causing a written record to be made and filed in the Resident Magistrate's court, are not defined. Is he going to have a casting vote in case of a deadlock or is he going to act as a quasi magistrate? If this is the case then we get into the bigger problem involving the basis of our constitution.

3:2 THE PROBLEM OF SEPARATION OF POWER.

The doctrine of separation of powers was first propounded by a French Jurist Montesquieu[5]. It divides the powers of government into three, the Legislature, the executive and the judiciary. Its value lies in the emphasis placed upon the checks and balances which are essential to prevent the abuse of the enormous power which are in the hands of the rules. It means three things; (a) That the same person should not form part of more than one of the three organs of the government (b) That one organ of government should not control or interfere with the exercise of its function by another organ e.g. that the judiciary should be independent of the executive and legislature. (c) That one organ of government should not exercise the function of the other. Convenient though it may be to divide the main organs of the government into three, the application of the doctrine strictly is not possible especially in modern government systems. In England for instance it basically means an independent judiciary. The same case applies to Kenya where it is not possible to keep the legislature and the executive strictly separate. Independence of the judiciary is however strived at, since it dispenses justice and gives review of administrative action, it is absolutely important that it remains independent from both the executive and the legislature.

In Colonial Kenya there was no strict separation of powers between the executive and the judiciary. District officers could at times do judicial work. At independence however importance of the separation was realised and we attained our independence on the westminister model constitution, which obviously embodies the doctrine of separation of powers. It therefore means that separation of powers is a constitutional concept and should not be tempered with.

One of the purposes of intergration of courts was to make the courts, including the subordinate courts an intergral part of judiciary independent at all levels from the executive.

District officers and District Commissioners form part of the government administrative machinery. Being administrators they fall under the executive body of the government. During the colonial rule, the administarators also performed the judicial duties especially in the lower courts. The intergration of the courts in 1967 abolished this kind of exercise which was clearly unfair and unjust, because the administrators used the courts to oppress the people in order to make their administrative work easier. This led to a situation where people saw the courts as caves of oppression rather than temples of justice.

By making the District officer the chairman of the panel of elders; The Act is defeating the very purpose of the independence of the judiciary. It is in effect undermining the intergrity of the judiciary. This is so because a magistrate who is better versed in the law is replaced by another public officer, the district officer who is not well versed in the law.

The elders however are to apply customary law in solving the land disputes that may arise. So the Legislature wanted to leave out the magistrates since they are not well conversant with customary law. The district officers are also not well conversant with it because more often than not, they do not hail from the districts in which they are officers. The legislature however did not intend that the chairmans duty was to act in a capacity like the magistrate, all he is supposed to do is to officiate and cause a record to be written. The practice may however turn out to be that the district officers will substitute their own judgement after listening to what the elders have to say. If this turns out to be the case, then the district officers will be acting as magistrates in civil land disputes. This will undermine the independency of the judiciary and justice as envisaged by the legislature will not be achieved; This can be concluded from the colonial experience as outlined above.

The district officers should be left out of the whole exercise. This is because, taking the social and political circumstances prevailing in the country, the district officers are the elite who are regarded in society as people who are wiser than the illiterate

or semi-illiterate vast majority of the population. They are an arm of the government so they import to the people that fear and awe that they have for the government. This means that the people are going to treat the decision they give with that awe and might not criticise it. Which means that the district officers shall then become magistrates. This will be bad because they do not know customary law of the area in which they are district officers which they can apply. This will again defeat the aims of the legislature.

3:3 THE COURT'S POWERS OVER THE ELDERS DECISION:

Under section 9 (c) of the Magistrates jurisdiction (Amendment) Act; The chairman of the panel which decides an issue shall cause a written record to be made and further cause it to be filed in the Resident Magistrates court.

The court has powers to modify or correct the record, or set it aside in case of corruption or misconduct. In this case the matter shall be heard by a new panel of elders. This being so if the court has not entered judgement. From the Act it looks like the only method of appeal open to a dissatified party is an application to the court within thirty days. So that a new panel is set up to listen to the dispute. There is no limit as to how many applications or where the limit to the applications shall be. This means that hthere could be a big number of applications, with no limit. This will lead to a lot of time passing before a land dispute is finally settled, and also many panels being set up which might exhaust all the recognised elders if any.

The elders owing to the economic climate prevailing in out society have to be given some remuneration. Days are gone when a pot of busaa after an elders decision was sufficient. The new producer relations have made money the main media of economic transactions. So it means that the elders will have to be paid in monetary terms. Who then will meet the costs of the suit so that the money goes to the adjudicaters? or from which fund shall they be paid. The Act does not make provision for this.

3:4 OTHER PROBLEMS:

Adjudication, consolidation and Registration made land a commodity which could be owned, mortgaged or sold. Therefore proprietors of land can sell their land at their leisure. Situations may arise where a proprietor has sold his land to a third lesee. The elders might then decide that customarily the land belonged to other members of his community and as such the proprietor had no right of selling that piece of land. What remedy then shall be available to those customarily entitled? Shall the one who has bought the land be ejected from it? and if so from whom shall he recover his money? Can those customarily entitled recover from the registered proprietor money as a civil debt or what compensation shall he give them?

The Act does not shed any light on the above problem despite the fact that ever since the introduction of the market economy to Kenya and the transformation of land into a marketable asset, And also due to the fact that due to population pressure people have moved out of their homes and purchased land elsewhere, aided to do this by the provisions of the Registered Land Act which gives individuals indifeasible titles; Many people have bought land from proprietors have been so registered and defeated the rights of those who are customarily entitled and the elders role is to try and restore these "extinguished" rights.

The other possible area of conflict will come up due to the fact that the Act as drafted is in complete contradiction with other statutes which are still in force. Among the Acts that it contravenes is the Land Control Act,[6] and the magistrates courts Act.[7]

The 1967 Magistrates courts Act abolishes African courts which used to deal with The African Customary Law disputes. In creating a uniform court system, the Act preserved customary law in section two where claims under customary law were defined to be inter-alia "Land held under customary Tenure". Meaning that customary law was meant to apply in claims of land held under customary Tenure. Ofcourse the land removed from the perview of customary tenure was to be governed by provisions of the Registered Land Act.

The effects of Magistrates jurisdiction (Amendment) Act appears to be that it applies customary law to civil claims on land as defined in the Act, irrespective of whether the land is held under customary tenure or not. In so doing the Act renders provisions of section two of the magistrates courts Act in relation to land useless.

The other Act that I shall tlook at is the land Control Act. One of the areas in which the elders have jurisdiction is in connection with the division of, or determination of boundaries to land. The land it refers to is Agricultural Land as defined in section two of the Land Control Act. In the same Act, it is provided that some transaction specified must get consent of the Land Control Board or else the transaction will be null and void, or if the Land Control Board does not give consent within three months, the transaction will be void. Among the transactions that require the consent of the Land Control Board is the division fof land into two or more parcels.[8] The Magistrates jurisdiction (Amendment) Act also gives jurisdiction to elders in connection with inter-alia divisions of agricultural land. These two Acts are at variance. Does it mean that after the elders have made their decision in connection with land, then the Land Control Board shall give its consent? or the elders decision is final? if this is the case, the Land Control Board work shall be rendered useless.

The Act as passed also introduces what would look like discrimination laws in our land law scheme. The Act covers agricultural land as defined in the Land Control Act as meaning inter-alia

S 2: (a) Land that is not within
(i) a municipality or a township...........
(ii) a market.

The Act will not apply to areas in a municipality or a market therefore. This means that land within a municipality or a market shall be governed by statute law while customary law shall be applied to other agricultural land. Therefore a situation will arise whereby an individual who owns land both within and without a municipality is governed by two different lwas, customary and statute.

This absurd results come up due to the fact that the Act was just an amendment to one statute governing land i.e. the Registered Land Act in Kenya in isolation from all the other Land Acts. It is as a result of this that one can safely argue that although the Act was passed with very good intentions it is not going to achieve alot in solving. By concentrating its attention on the Registered Land Act, the legislature forgot that there were othe existing statutes that were being contradicted. As it is also the Amendment Act defeats the aims with which the Registered Land Act was passed.

Land registration is based on the Torrens system, which was to the effect that the Register is a reflection of what is on the area covered. It is a true picture of what is on the land. The elders are going to declare customary rights which do not appear on the register. Once the customary rights have been declared; There is no requirement on the Act that they should be incorporated in the register. This means that the register is not going to be a true reflection of what is on the ground.

Despite this, the Amendment can be seen as a step forward in our land law in the sense that a person who is customarily entitled cannot be evicted from a piece of land for the mere fact that his rights do not appear on the register.

From the above it can be safely concluded that the piecemeal amendment Act as presently drafted may not work smoothly. In the next chapter I shall give or suggest alternative ways in which the envisaged injustice could have been solved.

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SUGGESTIONS AND CONCLUSION:

In this paper, I have tried to illustrate the good intentions with which the Magistrates jurisdiction (Amendment) Act was passed and I have also made an attempt to show that the Act as enacted might not achieve the intentions with which it was passed. This is due to the weakness and loopholes which are bound to defeat its realisation of the good intentions.

The Amendment Act was aimed at solving the injustice occasioned by S. 27 and 28 of the Registered Land Act. These section had the effect of extinguishing customary rights in land as soon as a piece of land is registered under a sole proprietor following the adjudication and consolidation processes. As a result of this many people who were otherwise customarily entitled could be evicted from their land as trespassers due to the fact that their rights did not appear on the register. This was the unfair situation which had to be corrected.

In its wisdom the legislature tried to solve the problems by passing the magistrates jurisdiction (Amendment) Act which vests jurisdiction in certain land disputes of a civil nature in a panel of elders. It is hoped that the elders shall apply customary law which will restore the customary rights, so that those whose rights ahad been extinguished by the Registered Land Act could have them restored.

The Act however is a peice meal modification of our Land laws which just amends one statute in the country in isolation from all the other statutes. As a result of these it contravenes other statutes which it does not repeal but are still effective. Also by amending the magistrate courts Act, it incidentally goes behind the Registered Land Act and defeats the aims with which the Act was passed. The Registered Land Act was passed with an aim of creating uniform law governing the holding of land in the country. This was necessary at independence so that we have a united nation with one uniform law. The register to be introduced was to be a true reflection of what went on the ground in relation to any piece of land. This law however proved unfair because Kenya as it still is has various indegenous communities with different culture and necesarily different ways of life and

culture and necessarily different ways of life and different views in relation to land holding. Law to be acceptable has to reflect a peoples phillosophy of life

The intention was that the magistrates jurisdiction (Amendment) Act will have different laws of the various communities applying to them. The Act was passed however has many weaknesses and may prove unworkable.

There are other ways in which the problem that the Amendment Act strives at solving could have been solved without the conflict with other statutes.

One most obvious way could have been by modifying the Registered Land Act or some of its provisions so that the Act could accomodate the customary rights that it abolishes, since this is what brings about the injustice.

One such modification could be to make more effective use of the provision to section 28 of the Registered Land Act which provides thus:-

> "......... nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee".

What should be solved is the question as to who the trustee envisaged in this section is. The Registered Land Act does not say what kind of trust the Registered Land Act should or deals with. Whether an express trust, or an implied trust. section 126 of the Act states thus:-

> 126(1) "A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and if so described shall be registered with the addition of the words " as trustee" but the register shall not enter particulars of nay trust in the register".
>
> (2) "An instrument which declares or is deemed to declare any trust .... may dbe deposited with the register for safe custody but such instrument or copy shall not form part of the register or be deemed to be registered".
>
> (3) "Where the proprietor of land .... is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instument creating the trust, but for the purpose

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> of any registered dealings he shall be deemed to be the absolute proprietor thereof and no person dealing with the land .... shall be deemed to have notice of the trust, nor shall any breach of the trust create any rights to indemnity under this Act".

From this section it is clear that particulars of the trust need not appear on the register. At the same time any registered transaction can proceed without notice of the trust where particulars do not appear on the register. For the purposes of any registered dealings, the proprietor is deemed to be the absolute proprietor. Breach of the trust does not create any rights to indemnity under the Act.

In the Kenyan situation most registration are done without the addition of the words "as trustee" as the Registered Land Act requires. This is so because the trust that could be added is the English trust. Customary rights are not recognised in registration which is basically done so as to put land on the English jurisprudence. The African trust which should have been indicated has not been recognised in legal circles. This is because the registered Africans should have held the land on trust since they were so doing on behalf of others who are customarily entitled.

When the courts realised the injustice created by the Registered Land Act, they tried to imply a trust, where a person is registered as sole proprietor in land where others are customarily entitled. The trust they used however was a constructive trust in the English sense.

A constructive trust as we shall see is implied at the discretion of the court which it imposes it when it feels if just and fair to do so. As such those entitled to rights in land customarily could not get them through the court process as of right, but it just depended on the discretion of the sitting judge.[1] As such not all people were satisfied. What was actually needed was a situation where all those customarily entitled could have their rights recognised as of right . What was needed was a customary trust. Nowhere is a customary trust recognised nor ways defined as to how it can be created. This is what should be defined in Act, because trusts have to be created in a definate way, or

else they fail.

A trust simply stated is a transaction wheréby, one party either declares himself as a trustee of his own property, or b gives his property to another person who then holds it on trust for a third party called the beneficiary. The one who holds the property is called the trustee. A trust is "an equitable obligation, bbiñding a person (who is called a trustee) to deal with property over which he has control (which is called trust property) for the benefit of persons (called the beneficiaries or cestui quc trust) of whom he may himself be one under any one of whom may enforce the obligation."[2]

Trusts may be classified into :-

1. Express trusts - Those created by ecpress declaration of the person in whom the property is vested. A can declare himself a trustee if Blackacre for B or convey it to C to hold it on trust for B. In this express trusts there are formalities which must strictly be followed.

2. Resulting trusts - Where an express trust fails, the trust property comes back to the owner as a resulting trust, or the court can imply it where it presumes what the intention of the settler was, like where the settler provided money for the purchase of the property in the name of another. Thus this is an implied trust.

3. Constructive trusts - This kind of trust is imposed by construction of equity, irrespective of the intention of the owner of the property whenever the court feels that this will be just and fair.

What nature then should a customary trust take? It cannot be equated to an express trust in the English sense because there are strict formalities followed in England in the creation fof this trust with regards to real property. They are embodied in section 153 of the 1925 law of property Act of England.

S. 153 (1) b "A declaration of trust respecting any lands or any interest therein must be manifested and proved in writing signed by some person who is able to declare such trust, or by his will".

S. 153(1) c "A dispostion of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same or by his agent thereto lawfully authorised in writing or by will".

This Act however is not applicable to Kenya because it was passed after the reception date. Section 126 of the Registered Land Act provides that there is no obligation to register any trust in respect of land or its details. So if a trust exists it does so outside the statutes. Section 163 of the Registered Land Act says, incase of the Act being silent we look at the common law.

In this case we cannot resort to common law, There are formalities in section 3(3) of the law of contract (Amendment) Act of 1968, which provides that an unregistered instrument can operate as a contract in connection with land it must be written and signed. Further action cannot be prevented only by reason oof absence of writing if the third party has partly performed his contract, or if is already in possesion of, or continues to be in possesion of the property in perfomance of the contract.

In the case of the Registered Land Act and using the formalities of the law of contract (Amendment) Act, it cannot be argued that there is a registered instrument which can operate as a contract. This means that there is nocontractual relationship between the registered proprietor and those who are not registered.

What should happen therefore is to enforce or legalise a <u>customary trust</u>. This can be done by amending section 27 and 28 of the Registered Land Act, so that they embody the sense that any registered absolute proprietor in accordance with Act whose rights have been customarily ascertained holds the piece of land on trust for all those others who are customarily entitled, so that the registered proprietor is bdeemed a trustee for the others. By so doing there shall be a statutory trust which will be ascertained using customary law. It shall be a trust "sui generis" which can be called a customary trust. Section 28 should be more specific and define the trustee it envisages in its proviso. The details of the trust need not appear on the register, but section 126 of the Registered Land Act should be supplemented so that it clearly

states that the customary trust in section 28 of the Act, shall be ascertained in accordance with customary law of the area in which the land is situated.

The other way in which the problem envisaged above would have been solved, is by enforcing properly and strictly the provisions of section 28(b) and section 30(g) of the Registered Land Act.

The indefeasible title conferred by section 28 is subject to leases, charges, and other encumbrances shown on the register. Subsection (b) of section 28 provides as follows:-

> S. 28(b) "Unless the contrary is expressed in the register, to such liabilities, rights and interests as affecte the same and are declared by S. 30 of this Act not to require noting on the register."

Section 30 deals with overriding interests which do not require noting on the register. Section 30(g) provides thus:-

> S. 30(g) "The rights of a person in possesion or actual occupation of land, to which he is entitled in rights only of such possesion or occupation, save where inquiry is made of such person and the rights are not disclosed."

Therefore a person in occupation or actual possesion of land has rights which cannot be defeated by provisions of section 28 of the Act. The overriding interests in section 30(g) have actually acquired legal sanctity by virtue of the fact that they are within a statute, and as such are not subject to interferance or disturbance such as eviction, save when inquiry is made and they are not disclosed. From this one can conclude that cases like Obiero -v- Opiyo and Esiroyo -V- Esiroyo were wrongly decided because they did not properly enforce provisions of section 28(b) and S. 30(g) since the people declared trespassers were in actual occupation of the land, and there is no evidence that any inquiry was made and they failed to declare their rights. The courts wrongly maintained that customary rights are not overriding interests and they cease to exist when the land is registered and proprietorship conferred upon the holder. Most of the people raising complaints are those who are in occupation or actual possesion of the land but failed to be registered since they only proposed one person among them

to be registered as the proprietor. This cases are likely to occur in family cases, where you find one member of the family registered on behalf of all the other members. The rights of these people can be catered for by enforcing section 28(b) and 30(g) of the Act.

In other cases where those who are customarily entitled are not in occupation of or actual possesion of the land, then the earlier proposition of a customary trust could be used.

To establish those customarily entitled in land. The court could compel elders to come and give evidence in court when a case arises where customary rights are contested. This will be treated as expert opinion so as to help the court form its own opinion with regards to custom and rights within the perview of the evidence Act.[4] The other possible solution could be to have special tribunals for cases involving customary law, so that a calibre of customary law experts can be created who can handle customary disputes. These experts must be those who understand the customs of an area where a case comes from. It might be wise to appoint third class District Magistrates or make their courts customary law courts where a panel of elders sits and decides these cases. This will be conveniently done if section two of the magistrates courts Act is amended to give room for more claims under customary law. Also this will be workable if the Registered Land Act is repealed. This will lead to two many complications again.

In conclusion I would say that the peacemeal amendments and modifications of the land statutes shall not do. This is because due to the imposition of the new and essentially alien land law to Kenya, many problems have arisen. In 1968 for example the group representative Act had to be passed because individual proprietorship was found unworkable among some indegenous tribes like the Maasai. The Magistrates jurisdiction (Amendment) Act is another piecemeal amendment which tries to go behind the provisions of the Registered Land Act, in a bid to restore the situation to what it was before the alien land law. But we have seen that this piecemeal amendment has also got its own complications which results in more confusion to the already confused realm of land law.

What we need is a complete law reform, which should have a law reform committee, which should asses all the land laws, by this I mean legislations and come up with a complete new codification of land law. This committee should work in such a way that it brings out a law that reflects the socio-economic circumstances prevailing in the country.

FOOTNOTES:

INTRODUCTION AND METHODOLOGY

1. CAP. 300 Laws of Kenya.
2. PER. MR. MARIAN. The parliamentary secretary for Lands and Settlement (as he then was).
   Parliamentary Debates, 10th July 1963 Column 780.
3. CAP 10 Laws of Kenya.

CHAPTER ONE:

1. Nyerere J.K., National property in freedom and unity page 53 and 54
2. Kiprono Arap Koros -V- Langat 7 court of Review report page 2. - where it was held that unlocated land can only be occupied with the permission of the Kokwet elders and that only the Kokwet elders can remove any occupant if he fails to develop the land.
3. Okoth - Ogendo H.W.O. "The political economy of Land law 1895 - 1974" (New Haven Conn) 1978 P. 58.
4. Okoth - Ogendo H.W.O. supra P. 61
5. S. 45 of the ordinance.
6. Sorrenson M.P.K. "origin of European settlement in Kenya" O.U.P. NBI 1968 page 49.
7. Ghai & McAuslan "public law and political change in Kenya" O.U.P NBI 1970 page 26.
8. S. 5 of the Crown Lands ordinance. Number 12 of 1915.
9. Wainaina -V- Murito 23 KLR 7
10. Okoth - Ogendo H.W.O. supra P. 70
11. Swynerton Plan 1954. article 13

12. Kiprono Arap Koros -V- Langat supra

13. Sorrenson Land development in the Kikuyu Country page 14.

14. S. 38 of the Land Registration (Native areas) ordinance 1959.

15. S. 89 Land Registration (Native areas) ordinance.

16. Effects of S.s 27 and 28 of the Registered Land Act Cap 300

17. (1972) E.A. 277.

18. (1973) E. A. 388.

19. Per Bennet J. (as he then was) page 389.

20. Civil case number 56 of 1978. HIgh court of Kenya at Nyeri.

21. (1971) KHD unreported.

22. Cap 80 Laws of Kenya.

23. High court of Kenya at Nairobi 1981 unreported.

CHAPTER TWO:

1. Cap 10 Laws of Kenya.

2. Cap 302 Laws of Kenya.

3. S. 6 Land Control Act; Cap 302.

4. Cap 318 Laws of Kenya.

5. Cotran E. - Tribal Factors in the establish ment of the East Africa legal system. Page 128.

6. Njunji Alex - from Gatundu - Daily Naiton of 19th November 1980. page 7.

7. Muriuki Godfrey - "A History of the Kikuyu upto 1904". PHD thesis London 1969 page 144.

8. The Luo customary law and marriage laws. By Wilson Gordon 1961 page 3.

9. Kamba customary law - By Penwill D. J. printed in Great Britain 1950 page 239.

10. Article 11 of the 1897 East Africa order in council.

11. Article 7, 14, 30, 51, and 52 of the 1897 order in council.

12. Cotran E. - supra page 133.

13. Section 2 of the Magistrates courts Act (Cap 10 laws of Kenya).

14. Section 6 of Land Control Act.

CHAPTER THREE

1. Muriuki Godfrey; "A History of the Kikuyu to 1904" PHD thesis UNIV of London 1967 page 161 - 163.

2. Per Mr. Mocha Ayoti - A Resident of Birongo village - Nyaribari chache location of Kisii District Born in 1890. In an interview on 5/3/1982.

3. Per S. 82 of the constitution.

4. Section 9B (a) of the Magistrates jurisdiction (Amendment) Act.

5. Esprit des Lois. Book XI Chapter 6.

6. Supra.

7. Supra.

8. Section 6 of the Land Control Act Cap 302.

SUGGESTIONS:

1. See Alan Kiama -V- Ndia Mathunya & Others - supra

2. Underhills Law of Trusts 11th Edition 1959 page 3.

3. Cap. 288 Laws of Kenya.

4. Section 51 of the Evidence Act Cap 80 Laws of Kenya.

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2. Habberson J.W. m - National building in Kenya "The case of land reform (North-western evenstem 1973)

3. Nyerere J.K. "National property in freedon and unity."

4. Sorrenson M.P.K. "Origin of European settlement in Kenya "O.U.P. NRB 1968

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2. Okoth - Ogendo H.W.O. "The political economy of land 198 1895-1974 - new haven - conn) 197